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No. 84-356

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE TRAVELERS INSURANCE COMPANY,
APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

On Appeal From The Supreme Judicial Court
For The Commonwealth Of Massachusetts

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Whether a state statute requiring insured employee benefit plans that result from collective bargaining to provide specified benefits for certain kinds of medical services is preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*[1]

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[1] The Travelers Insurance Company and Metropolitan Life Insurance Company were the appellants in the Supreme Judicial Court for the Commonwealth of Massachusetts. Metropolitan has also docketed an appeal to this Court (No. 84-325), and the Court has noted probable jurisdiction in that case as well. Metropolitan's brief on appeal to this Court will discuss preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a). Travelers joins in Metropolitan's arguments concerning ERISA and incorporates them by reference in this brief.

In accordance with Rule 28.1 of the Rules of this Court, Travelers states that it has no subsidiaries other than wholly-owned subsidiaries. Its parent company is The Travelers Corporation.

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (J.S. App. 1a-8a)[2] following this

[2] "J.S. App." refers to the separately bound Appendix to Jurisdictional Statements filed jointly in this Court by appellant and Metropolitan Life Insurance Company. "A." refers to the separately bound Joint appendix filed by the parties pursuant to Rule 30.

Court's remand (J.S. App.10a-12a) is reported at 391 Mass. 730 and 463 N.E.2d 548. The opinion of the Supreme Judicial Court prior to this Court's remand (J.S. App.13a-34a) is reported at 385 Mass. 598 and 433 N.E.2d 1222. The findings and conclusions of the trial court (J.S. App.36a-62a) are not reported. The trial court's opinion on the Commonwealth's motion for preliminary injunctive relief (J.S. App. 71a-84a) is not reported.

JURISDICTION

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts following remand (J.S. App. 9a) was entered on April 25, 1984. A notice of appeal to this Court (J.S. App.93a-94a) was filed on May 29, 1984. On July 12, 1984, Justice Brennan extended the time for docketing the appeal to September 22, 1984. *See* special appendix to the Jurisdictional Statement of Appellant Metropolitan Life Insurance Company, No. 84-325. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTES INVOLVED

Section 47B of Massachusetts General Laws Chapter 175 and the relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, are reproduced in J.S. App. at 87a-92a.

STATEMENT OF THE CASE

In December 1973 the Massachusetts legislature passed the "mandated benefit" statute at issue in this case. J.S. App. 37a. The statute, Section 47B of Massachusetts General Laws Chapter 175, requires, among other things, that employee health and welfare plans and insurance policies insuring such

plans provide specified "benefits for expense. . . arising from mental or nervous conditions."[3] J.S. App. 88a. Included among the insurance policies encompassed by Section 47B are group health insurance policies issued or renewed "within or without the commonwealth." *Id.* The specified benefits are mandated for any Massachusetts residents "covered under any such policy or plan." *Id.* Section 47B became effective on a mandatory basis on January 1, 1976. J.S. App. 37a.

In August 1974 the Massachusetts legislature's Joint Committee on Insurance, which sponsored this legislation, issued a report summarizing the background data it had compiled and the Committee's reasons for promoting Section 47B's passage. A. 426-47. The report indicates that the Committee was concerned about increasing the opportunity for private psychiatric treatment "[f]or the working persons and their families." A. 431. It cited studies which showed that "the organized worker had a higher rate of mental illness than the rich and executive professional classes." A. 430. Prior to the drafting of the new statute, the Committee made studies of the insured benefit plan experiences of such organizations as the United Auto Workers (A. 430, 433), the Retail Clerks, Local 770 (A. 434-35), the Kaiser-Permanente Plan (A. 433, 436), and the Group Health Association covering federal employees (A. 435), as well as Blue Cross. A. 438-42. It concluded:

> The committee felt that although Blue Cross had made good innovations over the years that mental health insurance must be made a mandatory feature of every plan.

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[3] Specifically, Section 47B requires that employee benefit plans and health insurance policies shall "provide benefits for expense. . . arising from mental or nervous conditions" of the following types (J.S. App. 88a.):

> "(a) In the case of benefits based upon confinement as an inpatient in a mental hospital under the direction and supervision of the department of mental health, or in a private hospital licensed by the department of mental health, the period of confinement for which benefits shall be payable shall be at least sixty days in any calendar year.
>
> (B) In the case of benefits based upon confinement as an inpatient in a licensed or accredited general hospital, such benefits shall be no different than for any other illness.
>
> (c) In the case of outpatient benefits these shall cover, to the extent of five hundred dollars over a twelve-month period, services furnished [by persons or institutions having certain specified qualifications]."

> Thus, it was decided that one standardized plan for all health insurers would be drawn up.

A. 442.

The Committee called attention to the fact that publicly supported mental health facilities were already "costing Massachusetts taxpayers millions of dollars annually." A. 432. It emphasized that through the mechanism of a mandated benefit statute there existed "a great potential for increased revenue to the commonwealth, because of 3rd party payments from insurance companies." A. 437. Before Section 47B's enactment, state operated mental health clinics were "able to collect insurance payments from only about 2% of the patients who use them," although an estimated 35% of such patients had some form of health insurance. A. 446-47. Under Section 47B "[t]his situation would change" (A. 447), and the state stood to gain "almost eight times more revenue. . . than the clinics have been able to collect in the past through fees from patients." A. 447.

The resulting statute, Section 47B, sought to shift a portion of the cost of mental health care in Massachusetts to the private sector. It sought to do this by two means: first, by directly compelling all employee benefit plans (whether insured or uninsured) to provide mental health care benefits to Massachusetts residents "covered under any such. . . plan" (J.S. App. 88a); and, second, by mandating that all health insurance policies insuring such plans (as well as other health insurance policies) contain the particular provisions for mental health care benefits specified in the statute. *Id.* The insurance provisions of the statute have the effect of mandating the benefits that insured plans provide to their beneficiaries. Only if the plan dispenses with insurance — not merely insurance for mental and nervous conditions, but all health insurance — can it avoid the statute's compulsion.

The Commonwealth has not sought to enforce Section 47B to the extent it applies directly to employee health and welfare plans. It concedes that ERISA prevents this. J.S. App. 43a and 59a. The Commonwealth has, however, sought to enforce the

other provisions of the statute. In its view health insurance policies insuring employee benefit plans must include the mandated benefits, and all such insured plans must accordingly furnish those benefits to plan beneficiaries residing in Massachusetts. This is so, it contends, even in the case of collectively bargained benefit plans in which companies and unions have agreed upon types and amounts of benefits different from those prescribed by the statute.

Appellants Travelers and Metropolitan have issued numerous group health insurance policies for employee benefit plans. J.S. App. 39a-42a. Following the enactment of ERISA, they concluded that, because of ERISA's broad preemption clause and Section 47B's effect upon collectively bargained plans, among other reasons, the mandatory feature of Section 47B could not properly be applied to employee benefit plans or to the health insurance policies implementing such plans.

On June 1, 1979 the Commonwealth commenced this action in the state court. It sought a declaration that Section 47B can validly be applied to insured employee benefit plans and an injunction directing Travelers and Metropolitan to comply with the state statute. A. 11-12. On August 28, 1979 the trial court entered a preliminary injunction ordering the defendants to provide Section 47B's mandated benefits to Massachusetts residents covered by group health insurance policies issued by the defendants after January 1, 1976. A.57-59.

At trial, Travelers and Metropolitan contended that Section 47B, as applied by the Commonwealth, was preempted not only by ERISA, but also by the NLRA.

The evidence on NLRA preemption was, in pertinent part, as follows: The preponderance of insurance policies affected by Section 47B have been issued to employers. A. 462; J.S. App. 43a. Certain of the defendants' group health insurance policies were issued to provide benefits for employee benefit plans that resulted from collective bargaining under the

NLRA. A. 462; J.S. App. 43a.[4]. Some collective bargaining agreements specify the particular medical expense benefits provided by insured plans. *Id.* Others prescribe the level or amount of employer contributions to insured plans. *Id.* In each case the insurance policy serves as the mechanism for providing the bargained benefits; it implements the terms of the collective bargaining agreement. A. 462. Where the collective bargaining agreement specifies the particular benefits to be provided — a common practice (A. 134-37, 155-56) — the benefit terms of the collective bargaining agreement and of the insurance policy are usually identical. A. 139. As collective bargaining brings changes in the plan terms, corresponding changes are made in the policy terms.

When a state mandates the benefits that must be provided by insured employee benefit plans, including collectively bargained plans, conflicts arise between the specific terms of statute and plan. A. 160-62. As the state's solutions for benefits questions proliferate, the flexibility of the collective bargaining process becomes impaired. A. 140. Since mental health benefits compete with other insurance benefits and other forms of compensation for inclusion in the collective bargaining agreement, the mandating of mental health benefits means that other benefits of the parties' choice must be omitted or deferred or their eligibility standards stiffened. A. 76-78, 80, 140. Only by relinquishing all health insurance can the plan avoid the legislature's mandate. A. 83. By compelling such a move, however, the state statute not only interferes with the

[4] The employee medical benefits plan of General Telephone and Electronics Corporation ("GTE"), insured by a Travelers policy, is one example. A.154-55. The GTE plan covers approximately 608,000 plan participants residing in more than 30 states. A.150.

parties' decision whether to insure or not to insure health benefits — a decision which is itself a mandatory subject of collective bargaining — but also deprives such plans of the essential protection and security that insurance provides. A. 72-73.

The trial court, however, held simply that Section 47B "is not preempted by the [NLRA]." J.S. App. 57a. It granted the permanent injunction sought by the Commonwealth. J.S. App. 67a-70a.

On appeal, the Supreme Judicial Court for the Commonwealth of Massachusetts affirmed. J.S. App. 35a. Citing *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the court acknowledged that "both the economic tactics used during [collective bargaining] negotiations and the substantive terms of the resulting agreement are 'left to be controlled by the free play of economic forces'." J.S. App. 26a. The court also accepted that

> . . . when labor and management agree upon subjects of mandatory bargaining, the terms of their agreement 'themselves become expressions of federal law, requiring preemption of intrusive state law.' *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 (1981).

Id. The court agreed, in addition, that "[o]rdinarily, preemption depends upon the *effect* of state law upon NLRA policy"; a state law which obstructs federal labor policy need not be a labor relations statute *per se* in order to warrant preemption. J.S. App. 29a (emphasis added). Finally, it conceded that since "the insurance provisions of § 47B effectively control the content of insured welfare benefit plans"(J.S. App. 20a), Section 47B does "impose[] some limits on the freedom of labor and management to bargain for health benefit terms." J.S. App. 31a.

Nevertheless, the Supreme Judicial Court held that Section 47B was not preempted by the NLRA. It commented that the state statute does not impose an "absolute" limit on the parties'

freedom to bargain (J.S. App. 31a), and then relied on two preemption "exceptions": (1) an exception "for public health laws" — an exception which, it conceded, this Court "has not actually applied" (*id.* at 28a); and (2) an exception derived from the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which prohibits federal laws not specifically relating to insurance from superseding a state law enacted "for the purpose of regulating the business of insurance." *Id.* at 30a. Although the court at one point stated that the "purpose" of Section 47B is "to protect public health" (*id.* at 28a), and later stated that "the purposes and effect of §47B extend beyond regulation of insurance as such" (*id.* at 30a), it considered it sufficient for purposes of McCarran-Ferguson that the statute "operates upon" insurance and insurance policies. *Id.* Despite the fact that Section 4 of the McCarran-Ferguson Act, 15 U.S.C. § 1014, expressly provides that the Act shall not be construed to affect in any manner the application of the NLRA to the "business of insurance," the court believed that the term "business of insurance" in Section 4 should be defined narrowly to include only "labor-management relations within insurance companies." J.S. App. 30a-31a, n. 25.

Travelers and Metropolitan appealed to this Court. By order dated July 6, 1983 (J.S. App. 10a-12a), this Court vacated the judgment of the Supreme Judicial Court and remanded the case to the Massachusetts court for further consideration in light of this Court's decision in *Shaw* v. *Delta Air Lines*, 103 S.Ct. 2890 (1983), which discussed ERISA preemption.[5]

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[5] On remand, the appellants preserved and reiterated their position concerning preemption of Section 47B by the NLRA. *See* Brief For Defendants-Appellants On Remand From The Supreme Court Of The United States, at 2 n.1.

On remand, the Supreme Judicial Court, with one Justice dissenting, again affirmed the judgment of the trial court (J.S. App. 9a) and reiterated its earlier opinion that ERISA does not preempt Section 47B. J.S. App. 1a-8a. In accordance with this Court's mandate, the lower court limited its opinion to ERISA and did not discuss the preemptive effect of the NLRA.

SUMMARY OF ARGUMENT

"The goal of federal labor policy" is to encourage labor and management "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959). The "fundamental premise" of the NLRA, therefore, is private collective bargaining "without any official compulsion over the actual terms of the contract" (*H. K. Porter & Co.* v. *NLRB*, 397 U.S. 99,108 (1970)) — whether that compulsion be direct or indirect (*NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952)), and by the states or the NLRB. *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 153 (1976).

This Court's decisions have, as a result, "made it abundantly clear" that "state attempts to influence the substantive terms of collective-bargaining agreements are . . . inconsistent with the federal regulatory scheme." *Machinists*, 427 U.S. at 153. There is "no room" in this federal scheme for the application of a state law which would "frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving." *Oliver*, 358 U.S. at 296.

Therefore, the "federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate" mandatory subjects of collective bargaining under the NLRA. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981).

Health benefits, and the question whether to purchase insurance to secure and protect health benefits, are both mandatory subjects of collective bargaining under the NLRA. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971). The Massachusetts "mandated benefit" statute, Section 47B, imposes direct and severe limits on "the solutions that the parties' agreement can provide" concerning those mandatory subjects of collective bargaining.

Federal law leaves the parties free to agree upon health benefits different from those mandated by Section 47B, and to secure and protect those benefits through the purchase of insurance. The parties to the insured benefit plans in evidence in this case reached just such agreements. Section 47B overrides those agreements, however, and replaces the parties' solutions with the Massachusetts legislature's solution. This form of "state interference with labor-management negotiations calls for preemption..." *Alessi*, 451 U.S. at 525. Because "the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state." *Oliver*, 358 U.S. at 296.

The court below conceded that the terms of Section 47B "effectively control the content of insured welfare benefit plans." J.S. App. 20a. It agreed that Section 47B "imposes some limits on the freedom of labor and management to bargain for health benefit terms." J.S. App. 31a. It held, however, that Section 47B was not preempted by federal law because of "the exception for public health laws" (J.S. App. 29a) — an exception which it admitted this Court "has not actually applied." J.S. App. 28a.

No such exception applies here. This Court's decisions have announced two doctrines for labor preemption. The first, set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), is designed to protect the primary jurisdiction of the National Labor Relations Board. Under this doctrine

state regulations are "presumptively preempted" if they concern conduct that is actually or arguably either prohibited or protected by the NLRA. *Belknap, Inc.* v. *Hale*, 103 S. Ct. 3172, 3177 (1983). The presumption can be rebutted. This can be done, after a balancing of state and federal interests, by a showing that the regulated conduct is only of "peripheral" federal concern or touches interests "deeply rooted in local feeling and responsibility." *Id.*

The second preemption doctrine, the doctrine involved here, is set forth in *Machinists*. It is designed to protect collective bargaining and other conduct which Congress intended to be unregulated "because 'left to be controlled by the free play of economic forces'." *Machinists*, 427 U.S. at 140. State regulation which impinges upon such conduct is preempted. Under this doctrine the preemption is not rebuttable; it is conclusive. Balancing state and federal interests is not involved. Only where preemption is based on protecting the primary jurisdiction of the NLRB will a "presumption of federal preemption . . . properly admit[] to exception when unusually 'deeply rooted' local interests are at stake." *Brown* v. *Hotel & Restaurant Employees*, 104 S. Ct. 3179, 3187 (1984).

Preemption in the present case is *not* based on preserving the NLRB's jurisdiction; it is based on the NLRA's protection of the conduct of collective bargaining, and of the substantive terms of the resulting agreement, from intrusive state regulation. State interference in this context results in a preemption which is not presumptive and which admits of no exceptions.

In part, Section 47B purports to regulate insurance. On that ground, the court below held that the state statute was saved from NLRA preemption by the McCarran-Ferguson Act. But that holding is inconsistent with both the language and the manifest purpose of McCarran-Ferguson. McCarran-Ferguson protects only state laws "enacted for the purpose" of regulating the business of insurance, 15 U.S.C. § 1012(b); it does *not* protect a state law which operates in part upon

insurance policies, and also directly upon employee welfare benefit plans, for the purpose of increasing employees' utilization of mental health care services at no cost to the state. *See Hart* v. *Orion Insurance Co.*, 453 F.2d 1358 (10th Cir. 1971); *Hamilton Life Insurance Co.* v. *Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969). All evidence of the purposes of Section 47B — the language of the statute, which applies directly to employee welfare benefit plans; the Massachusetts legislature's statements of the purposes of the statute in terms of increasing worker utilization of mental health services while shifting the costs to private parties; and the state Supreme Court's characterization of the statute as a "public health" statute — points to the conclusion that Section 47B was *not* enacted "for the purpose" of regulating insurance.

Even if Section 47B had been enacted for the purpose of regulating the business of insurance, it nevertheless would not have been insulated from NLRA preemption because of Section 4 of McCarran-Ferguson, 15 U.S.C. § 1014. That provision, which expressly states that "[n]othing contained in this [Act] shall be construed to affect in any manner the application to the business of insurance of the [NLRA]," excepts the NLRA from the general prohibition against federal preemption in Section 2(b). Congress had no intention, in McCarran-Ferguson, to sanction state interference with federal labor policy, free from preemption, through the mechanism of laws regulating the business of insurance.

ARGUMENT

I. SECTION 47B IS PREEMPTED BY THE NLRA

A. Federal Labor Policy Precludes State Interference With The Free Negotiation of Substantive Terms Of Collective Bargaining Agreements

The central purpose of the NLRA is to create an environment in which labor and management are free to negotiate wages, hours, and other terms and conditions of employment without any governmental restriction on the substantive terms of their agreement. This Court has so stated in unequivocal terms:

> *[T]he fundamental premise* on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.*

H. K. Porter & Co., 397 U.S. at 108 (emphasis added). Similarly, in *Machinists* this Court said:

> [O]ur decisions. . . have made it abundantly clear that *state attempts to influence the substantive terms of collective bargaining agreements* are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB.

427 U.S. at 153 (emphasis added).[6]

[6] This Court has emphatically rejected attempts by the NLRB to mandate terms of a collective bargaining agreement. *See H. K. Porter & Co.* v. *NLRB*, 397 U.S. at 108 (The NLRB "is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement"); *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952) ("[I]t is equally clear that the [NLRB] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements"); *NLRB* v. *Insurance Agents International Union*, 361 U.S. 477, 487 (1960) ("[I]t remains clear that § 8(d) was an attempt by Congress to prevent the [NLRB] from controlling the settling of the terms of collective bargaining agreements").

One of this Court's principal decisions holding that the NLRA restricts the power of the states to interfere with the substantive terms of collective bargaining agreements is *Oliver*. In that case a group of local labor unions and various interstate motor carriers had entered into a collective bargaining agreement which prescribed a wage scale for truck drivers. In addition, in order to prevent evasion of that wage scale, the agreement also provided that drivers who own their own vehicles must be paid, in addition to the prescribed wage, not less than a prescribed minimum rental for the use of their vehicles. Oliver, a member of one of the unions, sought to enjoin implementation of the minimum rental provision on the ground that it violated a state antitrust law. The Ohio Supreme Court found a violation of the state law and enjoined the enforcement of that term of the collective bargaining agreement.

The state court's decision was reversed by this Court. After first determining that the minimum truck rental provision was correctly characterized as a "subject matter properly included within the scope of mandatory collective bargaining," this Court held that the NLRA preempted application of the state antitrust law to prevent the union and employer "from carrying out their agreement *upon a subject matter as to which federal law directs them to bargain.*" 358 U.S. at 294-95 (emphasis added).

The Court reasoned that "the goal of federal labor policy" is to encourage labor and management "to establish, through collective negotiation, *their own charter* for the ordering of industrial relations, and thereby to minimize industrial strife." *Id.* at 295 (emphasis added). The Court then said:

> The purposes of the [federal labor laws] are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio anti-

> trust law here would wholly defeat the full realization of the congressional purpose. *The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving*, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . and federal law sets some outside limits . . . on what their agreement may provide . . . . *We believe that there is no room in this [federal regulatory] scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions . . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.*

Id. at 295-96 (emphasis added).[7] The conflict posed by the Ohio antitrust statute was not merely a conflict between state law and the terms of a private contract. "[T]he paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress." *Id.* at 296-97. Nor did it matter that the Ohio law was an antitrust law, applicable to society generally, rather than a law specifically aimed at labor-management relations:

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[7] The Court recognized that an intent to preempt state law would not be found to exist in those instances in which Congress has "indicated" that a particular subject "may be left to prohibition by the several states." *Id.* at 296. This exception to the *Oliver* principle was later applied by a plurality of the Court in *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

> Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law.... "Congress has sufficiently expressed its purpose to...exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481.

Id. at 297.[8]

The *Oliver* principle, precluding state interference with the terms of a collective bargaining agreement concerning mandatory subjects of collective bargaining, was reaffirmed by this Court in *Alessi*. New Jersey's Workers' Compensation Act prohibited reducing pension benefits by any amounts awarded under the Act:

> The right of compensation granted by this chapter... shall not be set off against employees' retirement benefits or payments.

N.J. Stat. Ann. §34:15-20 (West 1979). The defendants' pension plans, which were subject to ERISA and were the product of collective bargaining, contained provisions reducing a retired employee's pension benefits by the amount of any workers' compensation awards received after retirement.

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[8] The Court additionally characterized the conflict before it as one between "the federally sanctioned [collective bargaining] agreement" and "state policy which seeks specifically to adjust relationships in the world of commerce." *Id.* at 297. It left open the question of resolving "a case of a collective bargaining agreement in conflict with a local health or safety regulation." *Id.* This question is discussed *infra*, pp. 25-34.

This Court, citing *Oliver*, held that the New Jersey statute was preempted by the NLRA, as well as by ERISA:

> Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms. See *Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959); *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, 232 (1956).

Alessi, 451 U.S. at 525. In language harking back to the Court's original statement in *Oliver*, emphasis was again placed on the fact that the terms of a collective bargaining agreement acquire, in this context, a special status:

> As a subject of collective bargaining, pension terms themselves *became expressions of federal law*, requiring preemption of intrusive state law.

Alessi, 451 U.S. at 526 (emphasis added).

As the next section of this brief will show, Section 47B, like the state antitrust law in *Oliver* and the workers' compensation law in *Alessi*, clashes with the substantive terms of collective bargaining agreements, "expressions of federal law." The Massachusetts statute interferes, in a direct and substantive manner, with the free negotiation of substantive terms of collective bargaining agreements—the "fundamental premise" on which federal labor policy is based. *H. K. Porter*, 397 U.S. at 108.

B. Section 47B Interferes With The Free Negotiation Of Substantive Terms Of Collective Bargaining Agreements

The GTE Employee Group Insurance and Benefit Plan insured by Travelers exemplifies the type of insured, collectively bargained plan which specifies the particular medical benefits to be provided. A. 154-55, 324-33. The plan spells out in considerable detail the particular health benefits upon which labor and management have agreed. It contains, moreover, specific mental health benefits which differ from the mental health benefits mandated by the Massachusetts legislature in Section 47B. The GTE plan contains a "nervous or mental disorder" benefit which differs from the statutory benefit in such matters as the types of services covered, the particular persons or entities for whose services reimbursement will be made, the amount of money reimbursed for each outpatient visit, the total amount of money reimbursed in a year, and the maximum number of visits within a defined period.[9]

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[9] Exhibit 12, the GTE-IUE collective bargaining agreement negotiated in the summer of 1973 for the period September 3, 1973 through November 15, 1976 (A. 324) contained, as a part thereof, an Employee Group Insurance and Benefit Plan. A. 325. The Plan included an outpatient mental health benefit of $12.50 per visit" for "no more than fifty visits" during a defined "benefit period." Reimbursement was provided for "psychiatric care and treatment of a disability," provided treatment was rendered by a "licensed psychiatrist." A. 327. Section 47B contains no monetary limit per visit, no limit on the number of visits (although it does have a total monetary limit of $500 per year), and provides for reimbursement of unspecified "services" furnished by various entities including, in addition to hospitals and clinics, "comprehensive health service organizations" and "day care centers." Reimbursement is also required for "consultations" and for "diagnostic or treatment sessions" by "psychologists" and "psychotherapists." J.S. App. 87a-89a.

In the GTE-IUE collective bargaining agreement for 1976-1979 (Exhibit 13, A. 328-30), the "outpatient psychiatric benefit" of the Insurance and Benefit Plan was "improved" so as to allow payment for services at certain clinics and increases in the monetary limits per visit. In the GTE-IUE agreement for 1979-1982 (Exhibit 14, A. 331-33), this benefit was again improved by an extension "to covered dependents." A. 333.

Although that portion of Section 47B which refers to insurance policies does not expressly, in *haec verba*, direct a change in the terms of an insured collectively bargained plan itself, the practical effect of the statute's operation in this area is the same as if it had. It was clearly not contemplated, for example, that the administrators of such a plan could simply add the mandated term to the plan's insurance policy, but refuse to make any change in the terms of the plan itself, and then refuse also to make payment of the benefit on the ground that the plan does not provide it. The clear import of the statute's terms is that the mandated benefit is to be *paid*.

Indeed, this is shown by the language of the trial court's judgment in this very case. Notwithstanding the fact that the GTE collectively bargained plan does not provide in all respects the mandated mental health benefits of Section 47B, the judgment of the court specifically directs that all claims for the benefits mandated by Section 47B are to be paid, regardless of what collective bargaining agreements may say or not say. J.S. App. 67a-70a.[10]

[10] The trial court's Judgment On Findings ordered that "[c]ommencing December 18, 1980, the defendants shall pay expenses for benefits required by G.L. c. 175, § 47B on claims submitted by subscribers. . . ." J.S. App. 70. The court also directed the defendants to provide for the posting of notices stating that "THE [MENTAL AND NERVOUS] BENEFITS PROVIDED BY (NAME OF GROUP INSURANCE POLICY OR PLAN)...HAVE BEEN CHANGED FOR MASSACHUSETTS RESIDENTS ONLY," and that if past claims of this nature were not paid, another claim may be filed and, if the benefit changes apply, "YOUR CLAIM WILL BE PAID." J.S. App. 68a-69a.

Thus, for an insured benefit plan which is the product of collective bargaining, the practical effect of Section 47B's application is that it simply overrides the terms of the plan. The Supreme Judicial Court of Massachusetts conceded as much:

> Because a plan that purchases insurance has no choice but to provide mental health care benefits, *the insurance provisions of §47B effectively control the content of insured welfare benefit plans.*

J.S. App. 20a (emphasis added). Only by relinquishing the security and protection of insurance—an undesirable alternative from the standpoint of both plans and federal labor policy—can employers with collectively bargained benefit plans avoid the necessity of altering the plans' terms to conform to the mandate of the statute.[11] The Supreme Judicial Court acknowledged, accordingly, that "47B *imposes some limits* on the freedom of labor and management to bargain for health benefit terms." J.S. App. 31a (emphasis added). It said, however, that Section 47B is not an "absolute limit on the parties' freedom to negotiate," since the parties retain the option to relinquish the use of insurance for their plan. *Id.* This charitable characterization of Section 47B's restrictive effect fails to give appropriate recognition to two important points.

1. First, there is present here, as there was in *Alessi*, a direct clash between the specific terms of a state statute and those of federally sanctioned collective bargaining agreements, with respect to a mandatory subject of collective bargaining.

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[11] The compulsion exercised by the statute affects more than insurance for mental health benefits alone. Because all group health policies must contain the mandated mental health benefits provisions, no group health insurance is available at all unless the plan acquiesces and changes its collective bargaining agreement to conform to the mandate of the statute.

The subject of health insurance—the specific coverages to be afforded, as well as the decision whether to have such insurance—is a mandatory subject of collective bargaining. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. at 159; *Connecticut Light & Power Co.* v. *NLRB*, 476 F.2d 1079 (2d Cir. 1973); *Bastian-Blessing* v. *NLRB*, 474 F.2d 49 (6th Cir. 1973); *McLean* v. *NLRB*, 333 F.2d 84 (6th Cir. 1964).[12] As the evidence showed, the terms of collectively bargained plans insured by Travelers specifically provide for insured mental health benefits which are different from, and therefore prohibited by, the terms of Section 47B. In these circumstances, as *Alessi* holds, preemption of the state law is required.

The parallel with *Alessi* is striking. If one substitutes employee "health insurance" in place of employee "pensions"—*i.e.*, one mandatory subject of bargaining for another—the Court's statements in *Alessi* are equally dispositive of the present case:

> Where, as here, the [health insurance] plans emerge from collective bargaining, the...federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate [health insurance plan] terms. See *Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959).... As a subject of collective bargaining, [health insurance] terms themselves become expressions of federal law, requiring preemption of intrusive state law.

Alessi, 451 U.S. at 525-26.

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[12] Section 8(d) of the NLRA requires "good faith" bargaining over "wages, hours and other terms and conditions of employment." In *W. W. Cross & Co.* v. *NLRB*, 74 F.2d 875 (1st Cir. 1949), the First Circuit construed the term "wages" to include "emoluments resulting from employment" in addition to mere rates of pay, *id.* at 878, in holding that the terms, conditions and coverage of a group health and accident insurance policy are mandatory subjects of collective bargaining.

Section 47B flies in the teeth of the fundamental federal policy, embodied in the NLRA, that in order "to minimize industrial strife" employer and union are to be able to "establish, through collective bargaining, *their own charter* for the ordering of industrial relations. . . ." *Oliver*, 358 U.S. at 295 (emphasis added). It is a bargaining fact of life that the total amount of money an employer has available for wages and benefits constitutes "a finite piece of pie." A. 107, 139. The more the parties agree to spend for one benefit, the less there is for other benefits or for wages. A. 107, 163-64. The potential types and gradations of "trade-offs" are limited only by the ingenuity of the parties.

Thus, in the absence of state imposed "solutions" with respect to benefits matters, the flexibility of the collective bargaining process is retained, and the parties remain free (subject to such state regulations as Congress may intentionally allow) to devise their own solutions through selective adjustment of a large number of variables. It is the philosophical premise of the NLRA that by protecting this flexibility and freedom we best achieve our national goal of avoiding industrial discord.[13]

However, by mandating state-devised mental health benefits which directly conflict with the specific terms of collectively bargained plans, Section 47B works against this goal. The corollary of the state's command to have or increase a mental health benefit is that some other benefit—perhaps one more desired by the parties—must be omitted or diminished. James M. Dawson, a former plumber who became an experienced administrator of benefit plans and "Taft-Hartley

[13] Martin J. Frank, an expert witness for the defendants with substantial experience as a collective bargainer for both unions and employers, emphasized in his testimony that "...it's terribly important in collective bargaining, in my opinion, for the parties to have maximum flexibility. And to the extent that there are [health insurance] coverages which are required, there is less flexibility, and there's obviously less trading that can be done in collective bargaining because there's only so much money the parties can spend." A. 140.

trusts," testified at trial that union members in New Hampshire were "antagonistic" and "belligerent" as a result of that state's mandated benefit law, because "they had to have something they didn't want and to give up something they did want." A. 77. Many wanted to have or improve "vision" and "dental" benefits. A. 79-80. "But by taking money and spending it for mental health care, that precludes at this time the benefits that they would really like to have." A. 80. Many benefit plans increased their eligibility requirements to allow for the mandated benefit. A. 77. The Northern New England Carpenters Union not only had to increase eligibility requirements, but also "eliminated all vision and dental care under their package." A. 76-77.

In sum, the direct conflict here between the benefit terms of Section 47B and those of collectively bargained plans, concerning a mandatory subject of collective bargaining, obstructs federal labor policy and appropriately calls for preemption.

2. As noted, the Supreme Judicial Court dismissed the limiting effect of Section 47B as "not . . . absolute." J.S. App. 31a. It indicated that in its view there is no significant interference with the substantive terms of a plan "unless the parties decide to purchase insurance." *Id.* One fallacy in this position has already been shown. The decision whether or not to insure health benefits is itself a mandatory subject of collective bargaining, protected by the NLRA from state interference. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. at 159. A statute which causes the parties to an insured, collectively bargained plan to give up health insurance, in order to avoid the statute's mandate, is *ipso facto* causing those parties to change their agreement to insure.

But the compulsory effect of Section 47B does not end there. The uncontroverted testimony of James M. Dawson, an experienced plan administrator, was explicit and emphatic concerning the disadvantages of attempting to operate benefit

plans without insurance. Without insurance, he pointed out, a benefit plan loses the "great stability and the experience and the knowledge and know-how that any insurance company brings to the plan." A. 72. Many plans have "cash flow problems" (*id.*)—particularly those in the construction industry and other cyclical industries in which weather or other factors cause slack periods. A. 73-74. In these periods of cash flow difficulties "the very solvency of a plan could be jeopardized if [it] didn't have insurance." A. 72.

A mandated benefit law, he said, "makes them [employee benefit plans] make a very hard decision." A. 83. Either the plans must succumb and provide the mandated benefits —which often results in a benefit package disliked by both union and management, since other desired benefits must be reduced or delayed or eligibility requirements stiffened (A. 77-79)—"or we are going to go uninsured, which is the only way to [get] out of it. There's the gist of the whole thing." A. 83. And "[i]f they try to go uninsured, I think many of them will collapse. They are too small to handle it. They don't have the reserves." A. 84-85.

No matter which choice is made—to succumb to the mandated benefits or to give up insured health benefits altogether—the parties must arrive at a result which differs from the one at which they would have arrived in the absence of the state statute. Thus the conflict with federal labor law does not depend upon which choice the parties make, or upon which choice the state legislature has sought to induce; the conflict inheres in the state-imposed restriction on the parties' freedom of choice. In the end, the effect of Section 47B, when applied in the context of labor-management relations, is equally as intrusive, equally as interfering, equally as frustrating to the NLRA's processes, as would be the effect of a state statute expressly directing the parties to collective bargaining agreements to delete their agreed mental health benefit terms and to insert new terms composed by the Massachusetts legislature.

C. There Is No "Exception for Public Health Laws"

Although the Supreme Judicial Court conceded that "the insurance provisions of § 47B effectively control the content of insured welfare benefit plans" (J.S. App. 20a) and do "impose[ ] some limits on the freedom of labor and management to bargain for health benefit terms" (J.S. App. 31a), it nevertheless declined to find that Section 47B was preempted by federal law. As its first reason for so holding, the Massachusetts court relied on what it termed "the exception for public health laws."[14] J.S. App. 29a. This reliance was misplaced. In this context, where the purpose served by preemption is not preservation of the jurisdiction of the NLRB but the protection of conduct that Congress intended to be free from interference by either the states or the NLRB, no such "exception" exists. *Belknap*, 103 S. Ct. at 3177; *Brown*, 104 S. Ct. at 3186-87.

Even in the absence of express preemptive language in a federal statute or an indication that Congress intended to occupy a field of regulation completely, state law is appropriately preempted when it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *See also Brown*, 104 S. Ct. at 3187, and *Hill* v. *Florida*, 325 U.S. 538, 542 (1945).

In the field of labor law this Court's decisions "have announced two doctrines" for determining whether state regulations or causes of action stand as an obstacle to the purposes and objectives of Congress. *Belknap*, 103 S. Ct. at 3176-77. The first, set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), is designed to protect the primary jurisdiction of the National Labor Relations Board by prohibiting state interference with the NLRB's interpretation and administration of federal labor law. Under this doctrine,

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[14] The court acknowledged that this "exception" was one which this Court "has not actually applied." J.S. App. at 28a.

> state regulations and causes of action are *presumptively* preempted if they concern conduct that is actually or arguably either prohibited or protected by the [NLRA].

Belknap, 103 S. Ct. at 3177 (emphasis added). The presumption may be rebutted, under this doctrine, by a showing that the regulated conduct "is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility" which Congress intended to leave open to state regulation. *Id.* It is in the resolution of these cases that a balancing process is employed: "the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the Board's ability to adjudicate controversies committed to it by the Act. . . and the risk that the state will sanction conduct that the Act protects." *Id.*

The second preemption doctrine, set out in *Machinists*, is designed to protect the freedom created by federal law for labor and management to bargain collectively over wages, hours, and other terms and conditions of employment. This doctrine "proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated. . . ." *Belknap*, 103 S. Ct. at 3177. *See also International Union of Operating Engineers* v. *Jones*, 460 U.S. 669, 676 n. 8 (1983). The proscription is not presumptive and subject to rebuttal; it is conclusive.[15]

The *Machinists* doctrine governs the question whether Section 47B is preempted by the NLRA, for Congress has determined that the parties' resolution of mandatory subjects of

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[15] The *Machinists* doctrine does recognize, however, that the Congressional intent to preempt, ordinarily implied in cases of state regulation of conduct intended to be unregulated, will not be implied if it is shown that Congress expressed in some other statute an intention to tolerate such state regulation notwithstanding its interference with federal labor policy. *See, e.g., Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

There is no such expression of tolerance applicable to Section 47B. The McCarran-Ferguson Act does not provide it. *Infra*, pp. 34 - 45. And in ERISA Congress explicitly disclaims any intention to alter or restrict in any way the scope or operation of any federal law except those laws specifically repealed or amended by ERISA's express provisions. 29 U.S.C. § 1144(d).

collective bargaining is conduct protected from interference by either the states or the NLRB. *Alessi*, 451 U.S. at 525-26; *Machinists*, 427 U.S. at 153.

As a result, because this is a *Machinists* line preemption case, and not a case premised upon protection of the primary jurisdiction of the NLRB, the "exceptions" or avenues of rebuttal applicable to the *Garmon* doctrine cases do not apply here. *Belknap*, 103 S. Ct. at 3177. No *Machinists* line decision of this Court has rejected preemption on the ground that an exception existed for matters touching "deeply rooted" local interests or of only "peripheral" concern to the federal law. In approaching preemption problems, this Court has cautioned, it is necessary not to "confuse[ ] preemption which is based on actual federal protection of the conduct at issue [with] that which is based on the primary jurisdiction of the National Labor Relations Board." *Brown*, 104 S. Ct. at 3186. Only in the latter situation—which by definition excludes the *Machinists* doctrine cases—will a "presumption of federal preemption . . . properly admit[ ] to exception when unusually 'deeply rooted' local interests are at stake." *Id.* at 3187.

Preemption in the present case is *not* based on preserving the NLRB's jurisdiction; it is based on the NLRA's protection of the conduct of collective bargaining, and of the substantive terms of the resulting agreement, from intrusive state regulation. State interference in this context results in a preemption which is not presumptive and which admits of no exceptions.

The Supreme Judicial Court's statements, in its March 24, 1982 opinion, concerning what it termed "the exception for public health laws" (J.S. App. 29a) did not, of course, have the benefit of this Court's recent, clarifying discussions of labor preemption in *Belknap* and *Brown*. The comment in *Oliver*, relied on by the court below, that the Court did not have before it a conflict between a collective bargaining agreement and a "local health or safety regulation"—even assuming that it rose to the level of a suggested exception—was a suggestion

that never was consummated, that the Court declined to consider on the one occasion the proposal was before it (*Malone* v. *White Motor Corp.*, 435 U.S. 497, 514 (1978)), and that certainly is not good law for *Machinists* line preemption cases today.[16]

In *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979), a three member minority of the Court, speaking through Justice Stevens, expressed the view that for a particular type of *Machinists* doctrine case the *Machinists* guidelines for determining preemption should not be used. Without repeating the opposing positions of all four opinions in that case, and without addressing whether the minority view does or does not merit acceptance in some kinds of preemption cases, it suffices to say that the approach proposed by Justice Stevens does not purport to apply, and does not apply, to the specific type of preemption case now before the Court. Section 47B does not interfere with one of the procedural self-help weapons that affect in various degrees the economic balance of power during a labor dispute. It interferes with the end result, the goal of federal labor policy—the substantive terms of a collective bargaining agreement, freely arrived at.

Central to the *Machinists* doctrine is the principle that "the crucial inquiry" in questions of NLRA preemption is, not the statute's purpose, but whether the "exercise," the application, of state authority "would frustrate effective implementation of

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[16] Whether, in any event, Section 47B can be properly characterized as the type of conventional "local health regulation" the *Oliver* dictum had in mind is questionable. *See Michigan United Food & Commercial Workers Union* v. *Baerwaldt*, 572 F. Supp. 943, 953 n.19 (E.D. Mich. 1983), *appeal docketed*, No. 83-1570 (6th Cir. August 15, 1983). Section 47B's regulations focus on, not specified requirements for protecting the public health (*cf.*, *e.g.*, statutes directly regulating such matters as sanitary codes, G.L. c. 111, § 127A; lead poisoning, G.L. c. 111, § 191; or air pollution, G.L. c. 111, § 31C), but *who must pay* for certain mental health care benefits, and to what extent.

The report of the Joint Committee on Insurance, which sponsored Section 47B, indicated that because mental health care outpatient service in the

the Act's processes." *Machinists*, 427 U.S. at 147-48; *New York Tel. Co.*, 440 U.S. at 549-50 (Blackmun, J., concurring); *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252, 258 (1964) (preemption "ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation"). The fact that a state statute may be designated a workers' compensation statute, an antitrust statute, or an insurance statute, rather than an industrial relations statute, is not determinative. *Alessi*, 451 U.S. at 525-26; *Oliver*, 358 U.S. at 297. What is determinative is the statute's effect, its impact, upon federal labor policy.

In *New York Telephone*, however, Justice Stevens' opinion urged departure from this principle. The question was whether a New York unemployment compensation statute which paid benefits to strikers should be preempted on the ground that it conflicted with federal labor policy by so interfering with the self-help weapons available to management

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Commonwealth is paid for by commercial insurance only to the extent of 1%, "community mental health centers must be publicly supported, costing Massachusetts taxpayers millions of dollars annually." A. 432. The solution, the legislature felt, lay in the private sector, with employers. The report emphasized that "[t]here is a great potential for increased revenue to the commonwealth, because of 3rd party payments from insurance companies." A. 437. It pointed out that "Connecticut in their first year of their mental health insurance bill realized an increase in third party payments . . . of approximately sixty percent," which, for Massachusetts, "could mean an additional six million dollars in revenue." A. 437. Since Massachusetts mental health clinics "are able to collect insurance payments from only about 2% of the patients who use them," and an estimated 35% of the patients who use the clinics have some form of health insurance concerning hospitalization but not out-patient care (A. 446-47), Section 47B's passage would mean that "[t]his situation would change." A. 447. State operated clinics would acquire "almost eight times more revenue for the state than the clinics have been able to collect in the past through fees from patients." A. 447.

As a result, to revert to the *Oliver* dictum, Section 47B, rather than being a "local health regulation," is more aptly characterized as a state statute "which seeks specifically to adjust relationships in the world of commerce." *Oliver*, 385 U.S. at 297. As such, it has no special claim to exemption from NLRA preemption.

during a labor dispute as to alter significantly the balance of economic power established by Congress in the NLRA. The opinion of Justice Stevens stated that the New York statute was "a law of general applicability" (*New York Telephone*, 440 U.S. at 533), not purporting "to regulate or prohibit private conduct in the labor-management field" (*id.* at 532); that "Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs" (*id.* at 539); and that accordingly, by analogy to the manner in which the "deeply rooted" local interest exception of the *Garmon* doctrine is treated, state statutes having these characteristics should not be preempted unless there exists specific evidence of a "compelling congressional direction" to preempt. *Id.* at 540.

This approach was urged even where, as was true in *New York Telephone*, the state statute is found to have "altered the economic balance between labor and management." *Id.* at 531-32. The fact that the application of a state statute of this type "*affects the relative strength* of the antagonists in a bargaining dispute" was considered to be "not a sufficient reason" for conceding that preemption was appropriate. *Id.* at 546 (emphasis added).

The proposed rule would appear to make it considerably more difficult to preempt future state legislation interfering with the use of self-help economic weapons, unless the state statute is one which specifically regulates "private conduct in the labor-management field" (*id.* at 532) or "the bargaining relationships between the two classes." *Id.* at 533. Some might argue, in support of this position, that a measure of curtailment of the use of self-help weapons might be desirable, and that "greater stress should be put on the role of 'pure' negotiation in settling labor disputes, to the extent of eliminating more and more economic weapons from the parties' grasp." *NLRB* v. *Insurance Agents International Union*, 361 U.S. 477, 500 (1960).[17]

[17] This Court's response to this, however, was that "Congress' policy has not yet moved to this point" and the decision "is for Congress." *NLRB* v. *Insurance Agents*, 361 U.S. at 500.

But this case is *not*, in any event, an economic weapons case. This case concerns state interference with the end result, the substantive terms of a collective bargaining agreement. In *New York Telephone* Justice Stevens had no occasion to say, and did not say, that his proposal for the necessity to find a "compelling congressional direction" to preempt should be used in the case of state interference with our national labor policy's finished product, the collective agreement. He was addressing a claim of impact upon a party's self-help economic weapons during a strike. His opinion expresses concern about preempting general state laws which merely "affect" in some fashion the "relative strength of the antagonists." *New York Telephone*, 440 U.S. at 546. A state law which merely affects the efficacy of a self-help economic weapon may or may not, one could argue, tilt the balance of power enough to appreciably distort the result. For *this* question, therefore, putting precedent aside, it might be thought appropriate to use a preemption analysis that affords the states more leeway and federal labor policy less protection.

But a state law which interferes with the end result of the collective bargaining process is a different matter. Here there is no uncertainty about whether state interference with a particular procedural activity will or will not eventually distort the result. Here the state interference bears upon the result itself. For a case of this type, it seems clearly appropriate to retain the stronger protection of federal labor policy inherent in the *Machinists* preemption analysis. No "exception" exists or should exist here for state laws expressing "deeply rooted" local interests,[18] nor should any analogy to such an exception be

[18] Even if such an exception did exist, it would not apply to Section 47B. The decisions to which this Court referred in *Garmon* when it spoke of regulated conduct touching "deeply rooted" local interests, as well as the decisions which have applied the *Garmon* language subsequently, were all—without exception—decisions which dealt with "personal torts or violence to property and their holdings have been closely circumscribed." *Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 504 F. Supp. 54, 66 (M.D. Pa. 1980), *rev'd in part*, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). *Garmon* itself characterized the cases in this category

employed to afford the states more leeway. No balancing of state and federal interests is involved. Free collective bargaining, unfettered by "any official compulsion over the actual terms of the contract," is the "fundamental premise" on which the NLRA is based.

This point is strengthened, moreover, by the fact that the terms of the finished product, the collective bargaining agreement, become, as to mandatory subjects of collective bargaining,

> *expressions of federal law*, requiring pre-emption of intrusive state law.

Alessi, 451 U.S. at 526 (emphasis added). *See also Oliver*, 358 U.S. at 296-97 ("[T]he paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress"). Because the terms of the agreement are in this context "expressions of federal law," the benefit provisions of Section 47B which conflict, as they do here, with the benefit provisions of collective bargaining agreements *are in conflict with federal law*. As a result,

> *[t]he relative importance to the State of its own law is not material*. . . for the Framers of our Constitution provided that the federal law must prevail.

Free v. *Bland*, 369 U.S. 663, 666 (1962) (emphasis added); *Brown*, 104 S. Ct. at 3187.

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as cases concerned with state regulation of "conduct marked by violence and imminent threats to the public order," in which the "compelling state interest" was "the maintenance of domestic peace." *Garmon*, 359 U.S. at 247. *See also, Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local* 25, 430 U.S. 290, 299 (1977) ("cases involving violent tortious activity"). Section 47B doesn't fit this mold.

Finally, there is a second and equally cogent reason why the reasoning of Justice Stevens' opinion in *New York Telephone* does not apply here. His opinion proposes a new preemption analysis for those state statutes which do "not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field." *New York Telephone*, 440 U.S. at 532. Section 47B *does* represent an attempt by Massachusetts, both "directly [and] indirectly" (*NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. at 404), to regulate the content of insured employee benefit plans and hence the conduct of the parties forming those plans. Section 47B's impact does not merely diminish the relative economic strength of a party to a labor dispute. It compels insertion of a legislatively devised health benefit into a collectively bargained plan; it prohibits the free negotiation that results in "the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving." *Oliver*, 358 U.S. at 296.[19]

Under *Machinists'* doctrine a state statute which interferes with the substantive terms of a collective bargaining agreement, concerning a mandatory subject of bargaining, will be preempted (to the extent of the statute's application in the labor relations field), even if the state statute is not

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[19] Moreover, Section 47B would appear to be precisely that type of state statute as to which preemption is most appropriate — *i.e.*, a statute "resting upon [the state legislature's] views concerning accommodation of the . . . interests" of employers, employees and the public. *Machinists*, 427 U.S. at 140, n. 4, quoting A. Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1973). It represents an assessment by the state legislature that the Massachusetts worker needs assistance; that collective bargaining is not moving fast enough in the mental health benefits area; and that to help rectify this situation a new accommodation of the interests of the worker, the employer and the public will be made through the mechanism of mandated insurance.

directed specifically at labor relations, and even if a separate state interest is involved, unless Congress has expressed an intent in some federal statute to tolerate the type of state interference in question.

Section 47B is not, therefore, saved from preemption by any "exception" for a state's "public health laws." The remaining question is whether the McCarran-Ferguson Act is a federal statute which expresses a congressional intent to *allow* the specific type of state interference with federal labor policy produced by Section 47B. The answer is it is not.

II. THE McCARRAN-FERGUSON ACT DOES NOT SHIELD SECTION 47B FROM NLRA PREEMPTION

The court below held that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, indicates a congressional intent to permit the states, through the mechanism of insurance, to displace *pro tanto* federal governance of labor relations. J.S. App. 30a. A state statute which applies by its terms to employee benefit plans that are *uninsured*, and whose purposes and effects transcend and are largely unrelated to the business of insurance, was deemed to fall within the protective ambit of McCarran-Ferguson. The provision of McCarran-Ferguson which appears by its terms to preserve the full preemptive effect of federal labor law, 15 U.S.C. § 1014, was given a narrow reading, unsupported by the language or legislative history of the Act—a reading which renders the provision completely devoid of application. J.S. App. 30a-31a, n. 25.

The court then concluded that Section 47B, which concededly interferes with effective implementation of the NLRA's mandate of free collective bargaining, was nonetheless saved from NLRA preemption because it purports in part to regulate insurance and the McCarran-Ferguson Act empowers the states to regulate insurance. J.S. App. 30a-31a.

The court's analysis fails on two grounds. First, the language and legislative history of Section 47B and the court's own assessment of the statute's objectives demonstrate that Section 47B is not the particular kind of state statute that is entitled to McCarran-Ferguson's special protection; it is not a state law enacted "*for the purpose of* regulating the business of insurance." Second, McCarran-Ferguson does *not* reflect a congressional intent, express or implied, to sanction state interference with effective implementation of the NLRA. The language, structure and legislative history of that Act are completely at odds with any such interpretation.

A. Since Section 47B Was Not Enacted "For The Purpose Of Regulating The Business Of Insurance", The McCarran-Ferguson Act Does Not Apply

In demarcating the boundaries of state regulatory authority, Congress did not provide in the McCarran-Ferguson Act that any state law which applied to the business of insurance or which regulated the business of insurance was immune from superseding federal law. Instead, Congress provided that a state law was preserved from preemption only if it was enacted "*for the purpose*" of regulating the business of insurance:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State *for the purpose* of regulating [or taxing] the business of insurance..., unless such Act specifically relates to the business of insurance....

15 U.S.C. § 1012(b) (emphasis added).

State laws which apply to the business of insurance, or which in fact regulate the business of insurance, are outside the scope of McCarran-Ferguson's protection unless they are

enacted *for the purpose* of regulating the business of insurance. Thus, a state arbitration statute which applied by its terms to an arbitration clause included in a reinsurance agreement governed generally by New York law was preempted by the Federal Arbitration Act, 9 U.S.C. § 4, notwithstanding the McCarran-Ferguson Act, because the state law conflicted with the federal law and was not enacted for the purpose of regulating the business of insurance. *Hamilton Life Insurance Co.* v. *Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969). *Accord*, *Hart* v. *Orion Insurance Company*, 453 F. 2d 1358 (10th Cir. 1971).

Section 47B was plainly *not* enacted for the purpose of regulating the business of insurance. By its terms, the statute applies to "any employees' health and welfare fund which provides hospital and surgical expense benefits...," as well as to "any...policy of insurance...which provides hospital expense and surgical expense insurance...." J.S App. 88a. The mandating of insurance benefits was a means, not an end; and it was only one means among others which were wholly unrelated to insurance.

In a report by its Joint Committee on Insurance, the Massachusetts legislature itself described the purposes of Section 47B in these terms: to "safeguard[ ] the people of Massachusetts, young and old, rich and poor, against the burdensome costs of professional mental health services and care" (A. 430-31); to promote "the thrust toward community based care [and thereby] increase the availability for treatment in privately run mental health centers but save the taxpayers money as well" (A. 432); to decrease the amount of non-psychiatric care provided to Massachusetts residents by increasing the provision of mental health services before physical symptoms develop (A. 437); to tap "a great potential for increased revenue to the commonwealth...because of 3rd party payments from insurance companies" (A. 437); and to "officially recognize[ ] that mental illness is a health problem that all must be protected against." A. 437-38.

The Supreme Judicial Court of Massachusetts, the final arbiter of the interpretation of Section 47B (*Garner* v. *Louisiana*, 368 U.S. 157 (1961)), echoed the Massachusetts legislature in its description of the purposes of Section 47B. It held that "its *purpose* is to *protect public health*" (J.S. App. 28a) (emphasis added) and that "Section 47B is designed to solve a serious mental health problem. . . ." J.S. App. 29a.

All evidence of the purposes of Section 47B—the language of the statute, which applies outside the realm of insurance; the Massachusetts legislature's own statements of the purposes of the statute in terms of increasing utilization of mental health services while shifting the costs to private parties; and the state Supreme Court's characterization of the statute as a "public health" statute "designed to solve a serious health problem"—points in one direction: Section 47B was enacted for the purpose of ameliorating a perceived social health problem at least cost to the state; it was *not* enacted for the purpose of regulating the business of insurance.

The Court below conceded that "the purposes and effect of § 47B extend beyond regulation of insurance as such," but held that the statute was nonetheless protected by McCarran-Ferguson because "the statute *operates upon* insurance and insurance policies." J.S. App. 30a. (emphasis added). That was error: McCarran-Ferguson does *not* protect state statutes that "operate[ ] upon insurance and insurance policies"; it protects only state statutes "enacted *for the purpose* of regulating the business of insurance." 15 U.S.C. § 1012(b) (emphasis added). The state arbitration laws at issue in *Hamilton Life Insurance Co.* v. *Republic National Life Insurance Co.* and *Hart* v. *Orion Insurance Co.* "operated upon insurance and insurance policies"; but they were preempted by federal law, despite McCarran-Ferguson, because they were not enacted for the purpose of regulating the business of insurance.

Section 47B purports only in part to regulate insurance. Its language extends beyond the realm of insurance; its articulated

purposes are unrelated to insurance; and its effects are detrimental to the realization of federal objectives. Congress did not intend McCarran-Ferguson to sanction state interference with federal policies under the guise of insurance regulation; it sanctioned only state laws enacted "for the purpose" of regulating the business of insurance. Section 47B is not such a law.

B. McCarran-Ferguson Does Not, In Any Event, Sanction State Interference With Federal Labor Policy

The court below held that Section 47B was shielded from NLRA preemption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). J.S. App. 30a. By the terms of that section no federal law shall be construed "to invalidate, impair or supersede" any state law enacted for the purpose of regulating the business of insurance, unless the federal law "specifically relates" to the business of insurance. J.S. App. 92a.

This result was reached despite the fact that another section of the McCarran-Ferguson Act, Section 4, specifically provides that "*Nothing . . . in this [Act]* shall be construed to affect in any manner the application" of the NLRA to "the business of insurance." 15 U.S.C. § 1014. The court assigned this exception a very narrow meaning so that the prohibitory language of Section 2(b) continued to bar the NLRA's preemption of Section 47B. J.S. App. 30a-31a.

The Massachusetts court's narrow interpretation of the scope of Section 4 was offered without analysis or explanation, has no support in the legislative history, and makes no sense in the context of the Act as a whole.

The phrase "the business of insurance" appears in a number of places in the McCarran-Ferguson Act. Section 2(a) of the Act provides that:

> (a) *The business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). Section 2(b) says:

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating *the business of insurance*, or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b) (emphasis added). Section 4 of the Act goes on to provide, however, that:

> Nothing contained in this chapter shall be construed to affect in any manner the application to *the business of insurance* of the [NLRA]. . . .

U.S.C. § 1014 (emphasis added).

Thus Congress used the same phrase — *i.e.*, "the business of insurance"—to delineate the basic grant of state authority in Section 2(a), the general immunity from superseding federal legislation in Section 2(b), and the specific reservation of federal regulatory authority under the NLRA in Section 4. It would seem apparent from the language and structure of the Act—giving recognition to the familiar principle of statutory interpretation favoring consistent, harmonious interpretations of identical terms within a single statute—that "the business of insurance" was intended to have the same meaning and scope in all three portions of the Act.

In its decisions construing Section 2 of the McCarran-Ferguson Act, this Court has identified three principal criteria for determining the "business of insurance": (1) whether the activity in question "has the effect of transferring or spreading a policyholder's risk"; (2) whether it is "an integral part of the policy relationship between the insurer and the insured"; and (3) whether it is "limited to entities within the insurance industry." *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 123 (1982). *See also Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979). The "core" of "the business of insurance" is

> [t]he relationship between insurer and insured, the type of policy which [can] be issued, its reliability, interpretation, and enforcement.

SEC v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

The Massachusetts court, however, disregarded these criteria in arriving at a meaning for "the business of insurance" in Section 4. It concluded that the "most reasonable interpretation" of Section 4 is that *"labor-management relations within insurance companies* are subject to the NLRA." J.S. App. 30a-31a, n. 25 (emphasis added). The point is treated cursorily, in a footnote. *Id.* No explanation is provided as to why this narrow version of Section 4's scope is considered to be the "most reasonable." The authorities cited are not helpful.[20]

The labor relations of insurance companies are *not* a constituent part of "the business of insurance" within the meaning of Section 2. They do not meet the first two criteria of this Court's

[20] The court cited *Wadsworth* v. *Wayland*, 562 F.2d 70, 79 n.44 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978), and *Metropolitan Life Insurance Co.* v. *Whaland*, 410 A.2d 635 (N.H. 1979), for the proposition that the McCarran-Ferguson Act indicates "that Congress did not intend the NLRA to preempt laws such as § 47B." J.S. App. 30a. However, both of these decisions simply made brief, passing references to Section 2(b) of the McCarran-Ferguson Act without any attempt to address the implications of Section 4.

three-pronged test. They do not have "the effect of transferring or spreading a policyholder's risk," and they are not "an integral part of the policy relationship between the insurer and the insured." *Union Labor Life Insurance Co.* v. *Royal Drug Co.*, 440 U.S. at 216-217 (the Act's language "exempts the 'business of insurance' and not the 'business of insurance companies' ").

Since the labor relations of insurance companies are clearly not a constituent part of "the business of insurance" within the meaning of Section 2, and the term "business of insurance" should and does have a uniform meaning in the Act's various sections, the Massachusetts court's interpretation of Section 4 is simply incorrect. It results, moreover, in a Section 4 which is rendered superfluous and devoid of application. Because the labor relations of insurance companies are not "the business of insurance" within the meaning of Section 2, Section 2(a) grants the states no authority to regulate the labor relations of insurance companies, Section 2(b) gives the states no immunity in this respect, and there is accordingly no need to reserve federal authority over such matters in Section 4.

The end result of the court's interpretation of Section 4 is that all state laws enacted for the purpose of regulating the business of insurance are given leave to frustrate federal labor policy with impunity. Regardless of the type and degree of interference, the NLRA cannot preempt, because of Section 2(b)'s broad prohibition. Congress did not intend this. The court's interpretative process is faulty; its result is wrong.

By Section 4 Congress intended to make clear that, despite Section 2(b)'s restriction upón federal laws generally, the NLRA and two other specifically identified federal statutes (the Fair Labor Standards Act and the Merchant Marine Act) would continue to apply, without restriction "in any manner," within the same insurance realm as that regulated by the states.

Section 4 is, in purpose and effect, a specific exception to Section 2(b)'s general prohibition. "*Nothing* contained in this chapter"—*including Section 2(b)*—"shall be construed to affect in any manner the application to the business of insurance of the...National Labor Relations Act." 15 U.S.C. § 1014. Thus Section 2(b)'s prohibition against preemption of state laws does not affect the NLRA in any manner; the NLRA's application in the field is full and complete, with preemptive impact where appropriate.[21]

Section 4 does not expressly state that it is an exception to Section 2(b). Conceivably the two sections could be interpreted in such a manner that the NLRA could "apply" to the business of insurance pursuant to Section 4, but at the same time would be barred from "supersed[ing]" state laws by Section 2(b). Yet such an interpretation would produce a confusing and unsatisfactory result.

If the NLRA were *not* excepted from Section 2(b)'s general prohibition and if both the NLRA and a state law were then to apply to the business of insurance, with subsequent conflict, the result would be a standoff that Congress could not have intended. The NLRA would be unable to preempt, because Section 2(b) would bar it from superseding state law. The state statute, on the other hand, could not prevail; Section 4 would specifically affirm the NLRA's application to the business of insurance.

The only interpretation that melds the two sections in a reasonable way is that Congress intended the NLRA and the other two federal statutes specified in Section 4 to be excepted from the general prohibition of Section 2(b). Indeed, there would appear to be no need to have a Section 4 at all if it did not constitute an exception to Section 2(b) but merely affirmed

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[21] Shortly after the McCarran-Ferguson Act was enacted, this court noted that the Act "expressly provided" certain "exceptions" to the defenses set up in the act for the states against "[federal] attack under the commerce clause." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 431 (1946).

the NLRA's application to the business of insurance. In the aftermath of the *South-Eastern Underwriters Ass'n* decision (*United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)) it was already clear to Congress in 1945 that federal laws such as the NLRA, grounded on the Commerce Clause, could lawfully apply to the business of insurance.

Section 4, therefore, cuts across Section 2(b)'s general proscription of federal preemption by providing that Section 2(b) does not "affect in any manner" the NLRA's application to the business of insurance. As a result, the net effect of McCarran-Ferguson is that the NLRA retains the full scope of its authority; it remains free to preempt or not to preempt. Whether preemption occurs in any given case will depend upon application of the principles of such decisions as *Garmon* and *Machinists*. But McCarran-Ferguson is no bar.

Nor does the legislative history of McCarran-Ferguson support the Massachusetts court's interpretation of the Act. At no point in the legislative proceedings was there any suggestion that Congress intended to permit state insurance laws to frustrate federal labor policy, and yet be insulated from preemption.

As this Court observed in *SEC* v. *National Securities, Inc.*, during the legislative process leading to enactment of McCarran-Ferguson "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the states to tax insurance companies." 393 U.S. at 458-59 (citing the remarks of Representatives Hancock and Celler at 91 CONG. REC. 1087-88). There was no dissent from the proposition that the states should retain power to tax insurance companies; the debates focused primarily on whether limitations should be imposed on the application of the antitrust laws to the business of insurance. *See* 91 CONG. REC. 504 (remarks of Senators Ferguson and O'Mahoney); *id.* at 506-07 (remarks of Representative Revercomb); *id.* at 1115 (remarks of Representative Hancock).

Extensive debate ensued over whether and to what extent the states should be given the power to repeal *pro tanto* the application of the antitrust laws to the business of insurance by means of state laws enacted for the purpose of regulating the business of insurance. *See* 91 CONG. REC. 1447-85 (colloquy among Senators Pepper, McCarran, O'Mahoney, Murdock and Ferguson). No participant in the legislative process advocated that the states be empowered to repeal *pro tanto* the application of federal *labor* laws through enactment of state insurance laws. No participant suggested that state insurance laws be allowed under the new Act to conflict with the NLRA and to obstruct federal labor policy, without offsetting preemption.

The NLRA was enacted in 1935 and the Fair Labor Standards Act (FLSA) in 1938. Thus, when the McCarran-Ferguson Act was passed, the scope of collective bargaining and the content of fair labor standards had been established as matters affected with a strong national interest, over which Congress had asserted preeminent federal jurisdiction through enactment of the NLRA and the FLSA and the creation of administrative agencies to develop and implement a uniform body of federal regulations. If Congress in 1945 had harbored any intention of permitting state insurance laws to encroach upon this federal domain and to interfere with the newly established federal labor policies—shielded by a bar against federal preemption—there would surely have been some discussion of such a sensitive and important subject. There was none—in the debates and discussions, the explanation of the bills, or the reports summarizing the Act's provisions. *See, e.g.* 91 CONG. REC. 474-88, 1084-94, 1442-45, 1477-89; H.R. REP. No. 143, 79th Cong. 1st Sess. 1, *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 670, 672; and the legislative materials cited in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979).

Indeed, the NLRA was hardly referred to at all. What little mention of it there was consisted of a few brief remarks simply affirming that "*Nothing in the proposed act shall be construed to affect [its] application.*" 91 CONG. REC. 1443 (Feb. 26, 1945) (remarks of Senator O'Mahoney) (emphasis added). *See also* 91 CONG. REC. 1090 (Feb. 14, 1945); H.R. REP. No. 143, *supra*, 1945 U.S. CODE CONG. & AD. NEWS at 672.

Thus the McCarran-Ferguson Act does not provide Section 47B with any special sanction to interfere with federal labor laws. The NLRA and the federal policies it embodies are unaffected by McCarran-Ferguson. This is the purpose and effect of Section 4, correctly construed.

. . .

Section 47B reaches to the vital core of the NLRA—a collective bargaining agreement freely negotiated, without official compulsion by the states or the NLRB. The compulsion here is plain. Neither of the Massachusetts court's "exceptions" applies. Preemption under the NLRA is both appropriate and necessary.

CONCLUSION

The judgment of the Supreme Judicial Court should be reversed.

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